

EXHIBIT 14

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF JACKSON

In the Matter of:

HEIDI MARIE BROWN,

Petitioner,

and

ARNAUD PARIS,

Respondent.

Case No. 22DR17285

**RESPONDENT'S MOTION TO
DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION (ORCP 21
A(1)(a))**

Hearing Requested

INFORMATION REQUIRED BY UTCR 5.050

Time Requested for Argument: 3 hours

Telephone Conference Requested: No

Attorney or Party More Than 25 Miles from Courthouse: Yes

Court Reporting Services Requested: FTR

CERTIFICATE OF COMPLIANCE WITH UTCR 5.010

This motion does not require conferral prior to filing. Motions based on lack of jurisdiction are exempt from the conferral rule. UTCR 5.010(1).

MOTION

Respondent moves the court for an order dismissing the Petition for Dissolution of Domestic Partnership and to Establish Custody, Parenting Time, and Child Support ("Petition"), or in the alternative, dismissing the requests for relief concerning child custody and parenting time, because this court lacks subject matter jurisdiction. Without subject matter jurisdiction, this court has no authority to act on any claims for which

jurisdiction does not lie. Any judgment rendered without subject matter jurisdiction is void.

POINTS AND AUTHORITIES

In support of this motion, Father relies upon the following points and authorities: ORCP 21A(1)(a); ORS 107.445; ORS 109.701-109.834; ORCP 68; the cases cited in this motion; and the motions and declarations filed by Respondent or on his behalf in this matter.

ARGUMENT

1. Factual background.

The parties are unmarried parents of 8-year-old twins Juliette and Eva. Petitioner ("Mother") is an American citizen. Respondent ("Father") is both a French and American citizen. The children lived with the parties in California from 2015, not long after they were born, until August 2019. Between 2017 and 2019 the family visited France several times, staying in France for a total of 10 months over the course of those visits. In August 2019, the Family moved to Paris, France, where they stayed for nearly three years. From August 2019 to July 29, 2022, the children lived with the parties in Paris, France.

Mother wanted to relocate with the family from France to Oregon. Father ultimately opposed any permanent relocation away from France but wanted the family to remain intact and avoid a separation, if possible. Mother and Father engaged in mediation in France in July 2022 to resolve this conflict. Both parties had the benefit of legal counsel during the mediation.

On July 19, 2022, they entered into a written settlement agreement that would allow for the children to temporarily move with Mother to Oregon ("July Agreement"), which is attached hereto as Exhibit 1 and incorporated herein. The July Agreement provided that Mother and the children could go to Oregon for the summer and, if certain

1 conditions were met, remain in Oregon for the 2022-2023 school year ("July
2 Agreement"). The July Agreement provided that the children would return to France at
3 the end of the school year and spend the next school year in France. The July
4 Agreement further provides that if certain conditions pertaining to Father's health were
5 not met, then the family would return to France.

6 Although both parties assented to the July Agreement, Mother secretly planned
7 to violate the Agreement and not return the children to France in June 2023. Mother
8 and the children left France for Oregon on or about July 29, 2022 while Father remained
9 in France. He did not come to Oregon until August 19, 2022. Father had suspicions
10 that Mother did not intend on returning the children to France as the July Agreement
11 required. Then, on or about September 3, 2022, while in Oregon, Father learned of
12 Mother's intention to violate the July Agreement by keeping the children in Oregon
13 permanently. Father returned to France on or about September 5, 2022.

14 Father quickly took steps to rectify Mother's breach of the July Agreement. On or
15 about September 5, 2022 he retained an attorney in France to prepare an Application of
16 Return under the Hague Convention on the Civil Aspects of International Child
17 Abduction. He made a complaint the French police. On or about September 17 his
18 Application for Return under the Hague Abduction convention in France was filed. He
19 returned to Oregon from September 12 until October 6, 2022 to see the children and to
20 try and persuade Mother to return to France with the children. She refused. He then
21 returned to France for medical treatment.

22 On or about October 4, 2022, Father filed an action in Paris, France (his local
23 jurisdiction) seeking custody of and parenting time with the children. Mother was served
24 on October 11, 2022. The court in France has neither stayed the proceeding nor
25 declined to exercise jurisdiction. On October 7, 2022, Mother filed the instant action,
26 also seeking custody of and parenting time with the children. Father was not served

1 until November 10, 2022. Mother alleges incorrectly in her petition that the children had
2 no home state at the time of her filing.

3 On October 20, 2022, Father filed a Petition for Return of Children Under the
4 Hague Convention on the Civil Aspects of International Child Abduction ("Hague
5 Petition") with the United States District Court, District of Oregon, Medford Division. He
6 argued that Mother wrongfully removed the children from France because she intended
7 to keep them in Oregon in contravention of the July Agreement. The parties agreed to
8 abate this matter while the Hague Petition was being litigated.

9 The federal district court in Oregon ruled on Father's Hague Petition on
10 December 7, 2022. A transcript of the closing argument and that court's ruling is
11 attached hereto as Exhibit 2 and incorporated herein. The court found that Paris,
12 France was the children's habitual residence. Tr 46. The court described the children's
13 connection to their home and community in France:

14 "The children were French citizens. They spoke fluent French. The
15 attended French schools that had, you know, year-long programs at these
16 academies for music and dance.

17 "The girls were involved in sports. They went to school and family
18 excursions, regularly, throughout France. They had school-age friends
19 and attended certainly visits with friends and birthday parties, those type
20 of things. They had extended family and social supports in France,
21 including a godfather.

22 "So I'm finding that the children were fully assimilated to France and an
23 intensive fact inquiry points to the only conclusion that when the children
24 left France for Oregon in July of [2022], France was their habitual
25 residence."

26 Tr 46. The district court ultimately concluded that the children had not been wrongfully
removed from France to the United States because Father had, per the July Agreement,
consented to the children coming to Oregon. Furthermore, the children were not
wrongfully retained here because, although Mother clearly expressed an intent to violate

1 the July Agreement by not returning the children to France in September 2023, she had
2 not yet violated the July Agreement. Tr 53. Father's Hague petition was thus denied.

3 After the conclusion of the Hague Convention proceeding, this case came out of
4 abatement. Father filed a Response to Mother's petition. The Response raised the
5 issue that the court lacked subject matter jurisdiction. Father's response noted a
6 custody proceeding that he had filed in France prior to the commencement of this case.
7 He simultaneously filed a motion to dismiss Mother's petition pursuant to ORCP
8 21A(1)(c) (another action pending) and 21A(1)(h) (failure to state ultimate facts
9 sufficient to constitute a claim). That motion was argued on March 24, 2023, and is
10 under advisement. Father has now filed the present motion to dismiss for the lack of
11 subject matter jurisdiction under the UCCJEA (ORS 109.701 et. seq.).

12 Father's custody proceeding in France went to trial on March 31, 2023. The
13 French court intends to issue its judgment on the merits on April 21, 2023.

14 While Mother and the children remain in Ashland, Father continues to live in
15 France. Father maintains an apartment in France and pays for the utilities on the
16 apartment. He pays a residency tax on his apartment because he is a French resident
17 and lives in this apartment. He has filed tax returns in France from 2019 through 2022
18 (the most recent tax year). To the extent he has filed tax returns in the United States for
19 those years, it has been as a non-resident. Father's doctors are in France, and he
20 continues to receive medical care there, as recently as March 31, 2023. He had
21 surgery in France in October, not long after he commenced the custody proceeding
22 there. He has medical insurance coverage in France. When he travels to the United
23 States, he has medical travel insurance through France.

24 Father's current employer is based in Texas, and he sometimes has to be there
25 for work. He is also able to work remotely from Oregon and from France. His job is
26 currently temporary and necessary for Father to afford the litigation concerning the

1 children, although his job may continue after litigation ends. He does not maintain any
2 residence in Texas. He uses short-term rentals or hotels instead. He has come to
3 Oregon to exercise parenting time with the children. When he does, he stays in short-
4 term rentals or a hotel; he has no fixed residence in Oregon. He has documentation
5 showing that when his parenting time in Oregon concludes, he returns either to France
6 or to his temporary job in Texas.

7 Father's decision to continue to live in France was purposeful. In the summer of
8 2022, while he was living in Paris, Father was diagnosed with a serious medical
9 condition that will lead to cancer at some point. In the summer of 2022, it appeared that
10 Father would need to undergo surgery in the fall, and that additional hospitalizations
11 would be necessary. He was advised by his doctor that he should be treated at a
12 hospital in Paris. This is why Father ultimately did not agree to a permanent relocation
13 to Oregon and why the terms of the July Agreement were conditional on his ability to
14 receive appropriate medical care and appropriate medical coverage in Oregon. Father
15 has excellent medical insurance coverage in France. His healthcare costs are
16 completely covered. If he leaves France for more than six months, he will lose that
17 coverage.

18 **2. Statutory Framework for Determining Jurisdiction under the UCCJEA.**

19 The Uniform Child Custody Jurisdiction and Enforcement Act, ORS 109.701 to
20 109.834 ("UCCJEA") governs whether the courts of Oregon have subject matter
21 jurisdiction to make a custody determination. "Custody determination" includes any
22 order or judgment for custody, visitation, or parenting time. ORS 107.704(3). The first
23 custody determination concerning a particular child is the "initial determination." ORS
24 109.704(8). The relief mother seeks would be the initial determination for these children.
25 "Commencement" of a proceeding means the filing of the first pleading in the
26 proceeding. ORS 109.704(5).

1 Jurisdiction to make an initial determination is governed by ORS 109.741. That
 2 section sets forth four different bases for deciding which state has jurisdiction. The four
 3 bases are not equal alternatives from which the court may choose; they are prioritized,
 4 as explained below.

5 **A. Home State under the UCCJEA.** The first and primary basis for
 6 determining subject matter jurisdiction under the UCCJEA is “home state” jurisdiction.
 7 Under ORS 109.741(1)(a), a state has “home state” jurisdiction if:

8 “This state is the home state of the child on the date of the
 9 commencement of the proceeding, *or was* the home state of the child
 10 within six months before the commencement of the proceeding and the
 child is absent from this state but a parent or person acting as a parent
 continues to live in this state;” (Emphasis added.)

11 The term “home state” is defined as:

12 “[T]he state in which a child lived with a parent or a person acting as a
 13 parent for at least six consecutive months immediately before the
 14 commencement of a child custody proceeding. * * * Any temporary
 absence of any of the mentioned persons is part of the period.”

15 ORS 109.704(7). Home state jurisdiction is prioritized over all other jurisdictional bases.
 16 UCCJEA § 201, comment (1999). The UCCJEA treats foreign countries as states: “[a] court of
 17 this state shall treat a foreign country as if it were a state of the United States for the purpose
 18 of applying ORS 109.701 to 109.771.” ORS 109.714(4).

19 In this case, France, not Oregon, was the children’s home state when this matter
 20 was commenced. In fact, Mother has never argued that Oregon is the children’s home
 21 state because it clearly is not. Rather, Mother’s position, as set forth in her petition in
 22 this matter, is that the children had no home state on the date this matter commenced
 23 because they had not been in Oregon or in France for six consecutive months prior to
 24 the time she filed. Mother’s read of the statute is incomplete, incorrect, and contrary to
 25 Oregon case law.

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1 **i. Extended Home State Provision.** Mother's position with respect

2 to home state jurisdiction focuses exclusively on where the children lived in the six
 3 months immediately prior to the commencement of this action. However, that is not the
 4 only six-month period that must be considered when analyzing home state jurisdiction.
 5 Because the children were not living in France on the date Mother filed this action, we
 6 must determine if France was the children's home state at any time during the six
 7 months before the filing date. If so, France would have initial home state jurisdiction)
 8 ORS 109.741(1)(a). This "extended home state provision" of the UCCJEA comes into
 9 play in cases like this one, where a child has acquired a new residence less than six
 10 months before the commencement of a custody proceeding) UCCJEA § 201, comment
 11 (1999). In such cases, the court must evaluate whether the child had a "home state" at
 12 any point within the six-month period prior to the date of commencement of the action.
 13 Stated differently, the court must determine:

14 "whether at any point throughout the six months preceding the date of
 15 filing, it could be said that on a particular date, the child had lived with a
 16 parent in a particular state for at least six consecutive months. The
 17 purpose behind this statutory scheme is to extend a state's home state
status throughout the six-month period it would take for another state to
become the child's new home state."

18 *Prizzia v. Prizzia*, 58 Va. Ct. App. 137, 149 (2011). The analysis in *Prizzia* is
 19 consistent with the recent Oregon Court of Appeals case, *D.G. v. Marks*, 324 Or App
 20 195 (2023) (memorandum opinion). In that case, the child, age 10, had lived in
 21 Montana from birth until March 25, 2021, when the child began living in Oregon with the
 22 child's mother. On September 14, 2021, mother obtained a FAPA restraining order in
 23 Oregon that included an award of custody of the child to mother. The child's father
 24 challenged the custody order portion of the FAPA, arguing that Oregon lacked subject
 25 matter jurisdiction under the UCCJEA. The Court of Appeals agreed with father. It
 26 explained:

1 "Here, the trial court did not have subject matter jurisdiction over [the child]
 2 under ORS 109.741(1)(a), because [the child] had not lived in Oregon for
 at least six consecutive months immediately before filing the first pleading.
 3 * * * Therefore, Oregon was not [the child's] home state under the
 UCCJEA, and the trial court did not have jurisdiction under ORS
 4 109.741(1)(a). * * * Rather, it appears that Montana, not Oregon, was [the
 child's] home state when the proceeding commenced * * *."

5
 6 *Id.* at 198. The Court of Appeals rejected the notion that, because the child had
 7 moved from Montana to Oregon and had not yet been in Oregon for six consecutive
 8 months, that the child had no home state (as Mother argues here). Although *D.G.* is a
 9 memorandum opinion and non-precedential, it nonetheless demonstrates a clear and
 10 concise analysis and application of the extended home state provision of ORS
 11 109.741(1)(a) by the Oregon Court of Appeals. The fact that the case is non-
 12 precedential suggests that the Court of Appeals was doing nothing novel or interesting
 13 in the case; it merely applied the plain language of the statute. ORAP 10.30(2)(b)
 14 (outlining relevant factors to be considered in determining whether an opinion will be
 15 precedential, including whether the opinion establishes a new legal principal or rule, or
 16 clarifies existing law; whether the opinion decides a novel issue; whether the opinion
 17 resolves a recurring legal issue with no clear precedent; whether the opinion criticizes
 18 existing law; whether there are separate concurring or dissenting opinions that the
 19 author has requested be precedential; and whether the opinion resolves a conflict
 20 among existing nonprecedential opinions). The Court of Appeals did nothing
 21 particularly remarkable in deciding the jurisdictional issue in *D.G.* – it simply applied the
 22 plain language of ORS 109.741(1)(a).

23 Mother commenced this action on October 7, 2022. Thus, the question is
 24 whether at any time between April 7, 2022 and October 7, 2022, the children had lived
 25 in France for at least six consecutive months) The answer is clearly yes. The children
 26 lived in France with both parents from 2019 until July 29, 2022 when they came to

Oregon with Mother. Thus, when Mother commenced this action, France was the still the home state of the children under the “extended home state” provision of the UCCJEA.

The UCCJEA commentary suggests that *Prizzia* and *D.G.* were correctly decided. In discussing Section 208 [Jurisdiction Declined by Reason of Conduct; ORS 109.764]:

“Since there is no longer a multiplicity of jurisdictions which could take cognizance of a child-custody proceeding, there is less of a concern that one parent will take the child to another jurisdiction in an attempt to find a more favorable forum. Most of the jurisdictional problems generated by abducting parents should be solved by the prioritization of home State in Section 201 [ORS 109.741]; the exclusive, continuing jurisdiction provisions of Section 202 [ORS 109.744]; and the ban on modification in Section 203 [ORS 109.747]. **For example, if a parent takes the child from the home State and seeks an original custody determination elsewhere, the stay-at-home parent has six months to file a custody petition under the extended home state jurisdictional provision of Section 201 [ORS 109.741], which will ensure that the case is retained in the home State.**” (Emphasis added).

UCCJEA § 208, comment (1999). This commentary perfectly describes the instant case. Mother removed the children from their home state in France and brought them to Oregon. (The reason for the children’s removal is immaterial to the home state analysis. UCCJEA § 201 comment (1999) (“Under this act, it is no longer necessary to determine why the child has been removed”). Father had at least until January 29, 2023 – six months after the children left France – to file a custody proceeding in France because France, not Oregon, has home state jurisdiction under the extended home state provision of the UCCJEA.

A further requirement of the “six-month extended home state provision,” is that a parent or person acting as a parent continues to live in the purported home state. Thus, for Father to prevail on his argument that France is the children’s home state because

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1 they lived there for six consecutive months within the six-month period prior to the
2 commencement of this action, then Father must "continue to live" in France.

3 Father, in fact, continues to live in France. Father is a French citizen. He
4 continues to own an apartment in France. He pays taxes as French resident and has
5 filed resident tax returns there for the past four years. He maintains medical insurance
6 coverage in France and receives medical care there. Father has visited the children
7 frequently since they came to Oregon, but he has never established a residence here.
8 He does not own or rent real property in the United States, save for short-term-rentals
9 or hotels. When he is done visiting the children in Oregon or with his temporary job in
10 Texas, he ultimately returns to his home in France.

11 Father's time away from France to visit the children or attend to work in the
12 United States does not defeat the requirement that he continue to live in France for this
13 section of the UCCJEA to apply. In fact, the UCCJEA contemplates this situation.
14 Under ORS 109.704(7), "[h]ome state" means "the state in which a child lived with a
15 parent or a person acting as a parent for at least six consecutive months immediately
16 before the commencement of a child custody proceeding. * * * Any temporary absence
17 of **any of the mentioned persons** is part of the period." Any time that Father spends
18 away from France – in Oregon to spend time with the children, or in Texas for work – is
19 a mere temporary absence from France. Father ultimately returns to his home in
20 France – to the apartment he owns there (the only residence he maintains) and to the
21 doctors that continue to treat him there. As explained in greater detail, below, a
22 temporary absence can be for a relatively long period of time, even if the individual does
23 not return to the home state during the course of their absence. See *Shepherd v.*
24 *Lopez-Barcenas*, 200 Or App 692 (2005) (holding that the mother and child's absence
25 from the home state for one year while mother obtained a master's degree was a
26 "temporary absence" within the meaning of ORS 109.704(7).)

1 There is no evidence to support a finding that Father lives anywhere but in
 2 France. If he does not live in France, then where does he live? In Oregon, where he
 3 comes solely to spend time with his children and where he maintains no residence? In
 4 Texas where his job is located and where he occasionally works, but also maintains no
 5 residence? Because Father continues to live in France, save for temporary absences to
 6 work or to see his children, and because the children had lived in France for more than
 7 six consecutive months within the six-month period prior to the filing of this matter,
 8 France has home state jurisdiction under the UCCJEA.

9 **ii. Temporary Absence from France** Furthermore, France has
 10 home state jurisdiction because the children are only temporarily absent from France.
 11 Under ORS 109.704(7), when defining what state qualifies as the home state, any
 12 temporary absence from the home state counts toward meeting the six-month period
 13 required by ORS 109.741(1)(a). The two most recent cases to address the meaning of
 14 “temporary absence” demonstrate that, in this case, the children’s presence in Oregon
 15 is a temporary absence from France and, accordingly, France continues to be their
 16 home state.

17 The facts in *Shepherd v. Lopez-Barcenas* are strikingly similar to the facts of this
 18 case. In *Shepherd*, mother and father lived in Mexico, where their child was born. In
 19 September 1999, mother and the child moved to Ashland, Oregon so that mother could
 20 complete a one-year master's degree program at Southern Oregon University. When
 21 mother left, the parties agreed that she would return to Mexico when she finished her
 22 degree. One month after mother and the child moved to Ashland, mother told father
 23 that she wanted to end their relationship, but that she and the child would be returning
 24 to Mexico when she completed her program (albeit to a different location than the family
 25 home). In January 2000, father moved to Oregon and filed here to establish parentage,
 26 custody and parenting time. In December 2000, the Jackson County Circuit Court

1 entered a judgment for custody and parenting time. Months later, mother moved to
 2 vacate the custody and parenting time judgment, arguing that the trial court lacked
 3 jurisdiction under the UCCJEA. *Id.* at 694-95. The Court of Appeals agreed with
 4 mother, holding that:

5 “[A]t the time father commenced the filiation proceeding, N’s home state
 6 was Mexico. The parties had lived in Mexico since N’s birth in 1998.
 7 Mother and N had lived in Oregon for only three months at the time that
 8 father filed his petition, and mother intended to return with N to Mexico.
 9 Their absence from Mexico was only temporary, and the time spent
 10 in Ashland is therefore considered to be time in Mexico for the
 11 purpose of determining the home state. ORS 109.704(7). Accordingly,
 12 mother and N are considered to have lived in Mexico for the six-month
 13 period before the commencement of the proceeding, and Mexico was N’s
 14 home state. For that reason, Oregon courts lacked jurisdiction to make an
 15 initial custody determination for N. The circuit court correctly vacated the
 16 custody and parenting-time provisions of the December 2000 judgment.”

17 *Id.* at 696. Father argued that even if mother intended to return to Mexico, he
 18 intended to remain permanently in Oregon. Thus, according to father, the child had no
 19 home state, so Oregon could assert jurisdiction because the child had a significant
 20 connection to Oregon. The Court dismissed that argument. It reasoned that,
 21 regardless of father’s intention, mother was still only temporarily absent from Mexico.
 22 “Under ORS 109.704(7), ‘any temporary absence of any of the mentioned persons’
 23 (emphasis added) is considered to be part of the period during which [the child] lived in
 24 Mexico for the purpose of determining the home state.” *Id.* at 697 (emphasis added in
 25 original.)

26 As in *Shepherd*, the Father and the children are present in Ashland on a
temporary basis for the purpose of attending school for the 2022-2023 school year. The
July Agreement expressly provides that the parties never mutually intended for the
children to stay in Ashland on a permanent, ongoing basis beyond the end of the 2022
2023 school year. Even if Father had remained in Ashland with Mother and the

1 children, the absence from France would still be a "temporary absence," just as in
 2 *Shephard*. Mother's secret intention to remain in Ashland with the children does not
 3 defeat the temporary nature of the children's stay here.

4 *Schwartz and Battini*, 289 Or App 332 (2017) stands in contrast to *Shephard*. In
 5 that case, the parties were the married parents of one child, who had been born in
 6 Oregon. Mother was a United States citizen from Oregon and father was a French
 7 national. In the two-and-a-half years since the child's birth, the family lived either in
 8 Oregon, France or Indonesia at various times, never for longer than seven months. The
 9 last place the family lived together was in Indonesia. They were there just shy of six
 10 months when mother left with the child and came to Oregon to see friends and family.
 11 Shortly thereafter, father moved from Indonesia to Singapore, because the family had
 12 been contemplating moving there. Around the same time, mother decided to separate
 13 from father and not return to Indonesia. Mother obtained a judgment in Oregon that
 14 addressed custody and parenting time. *Schwartz*, 289 at 335.

15 Father later challenged that judgment and asserted on appeal that Indonesia –
 16 not Oregon – had jurisdiction to make an initial custody determination, because
 17 Indonesia was the child's home state and the subsequent time the child was in Oregon
 18 was a "temporary absence" within the meaning of the UCCJEA. *Id.* at 337. In deciding
 19 the case, the Oregon Court of Appeals adopted a "totality of the circumstances test" for
 20 determining whether or not an absence from a putative home state qualifies as a
 21 "temporary absence" under the UCCJEA. *Id.* at 342-43. This test "looks at all the
 22 surrounding circumstances of a purported temporary absence, including intent of the
 23 parties and duration of the absence, to assess whether the absence should be treated
 24 as a temporary departure from the putative home state." *Id.* at 342. In adopting this
 25 test, the Court specifically notes that it is consistent with their prior decision in
 26 *Shephard*. *Id.* at 343.

1 The Court of Appeals concluded that the child's absence from Indonesia was not
 2 a "temporary absence," and, therefore, the child did not have a home state within the
 3 definition of the UCCJEA. In reaching that determination, the Court cited the following
 4 facts: "the parties lived sequentially in different places without firm plan either to stay in
 5 one place for a particular time, or about where to live next[]"; the family was planning on
 6 leaving Indonesia for Singapore at the time the child left with mother to visit Oregon, so
 7 there was no concrete plan for mother and the child to return to Indonesia; and "the
 8 parties intended their time in Indonesia to be temporary." *Schwartz*, 289 at 343.

9 The facts in *Schwartz* do not match the facts of this case. Unlike *Schwartz*, the
 10 parties and their children did not move frequently between jurisdictions staying for
 11 relatively brief periods. Prior to July 29, 2022, they had been in France for three years.
 12 Unlike *Schwartz*, there was a written agreement expressing the parties' intent for the
 13 children to return to France after, at most, one year in Oregon. And, unlike *Schwartz*,
 14 the parties did not intend for their time in France to be temporary. France is Father's
 15 home and the home to which he expects the children to return, consistent with the July
 16 Agreement.

17 In light of these cases, it is clear that the facts of this case support a finding that
 18 the children's departure from their home state in France to Oregon was only temporary.
 19 When the children came to Oregon, France had been their home for the prior three
 20 years; they had been in Oregon less than three months when Mother filed this action.
 21 The July Agreement provided that the children would return to France on August 23,
 22 2022 if certain conditions were not met. Even if those conditions were met, the children
 23 were to remain in Oregon only until the end of the current school year, when they would
 24 return to France for the 2023-2024 school year. However, if further conditions
 25 pertaining to Father's medical care could not be met, the July Agreement provides that
 26 "the family will return to France."

1 Considering the totality of the circumstances, the children's absence from France
 2 is only temporary. Therefore, France is and continues to be, their home state under the
 3 UCCJEA.

4 **B. Other Bases for Jurisdiction under the UCCJEA.** If Oregon is not
 5 a child's home state, it may still have subject matter jurisdiction under ORS 107.741(b)
 6 to (d), which confer jurisdiction on a state that is not a home state in three specific
 7 circumstances. As the following analysis demonstrates, none of those circumstances
 8 applies in this case.

9 **i. Significant Connection.** ORS 109.741(1)(b) confers jurisdiction to
 10 Oregon if:

11 "A court of another state does not have jurisdiction under
 12 subsection (1)(a) of this section, *or* a court of the home state of the
 13 child has declined to exercise jurisdiction on the ground that this
 14 state is the more appropriate forum under ORS 109.761
 [inconvenient forum] or 109.764 [jurisdiction declined by reason of
 conduct], *and*:

15 "(A) The child and the child's parents, or the child and at
 16 least one parent or a person acting as a parent, have a
 significant connection with this state other than mere
 physical presence; and

17 "(B) Substantial evidence is available in this state concerning
 18 the child's care, protection, training and personal
 relationships;"

19 The first part of ORS 109.741(1)(b) does not apply ("[a] court of another state does not
 20 have jurisdiction under subsection (1)(a) of this section") because another state, France,
 21 has home state jurisdiction for the reasons explained above.

22 The second part of ORS 109.741(1)(b) ("a court of the home state of the child
 23 has declined to exercise jurisdiction on the ground that this state is the more appropriate
 24 forum under ORS 109.761 [inconvenient forum] or 109.764 [jurisdiction declined by
 25 reason of conduct]") also does not apply because the court in France has not declined
 26 to exercise jurisdiction. Moreover, neither Mother nor the children have a significant

1 connection with Oregon beyond mere physical presence. Prior to July 29, 2022, the
 2 children had not lived in Oregon since they were approximately three months old.
 3 Additionally, the most substantial evidence about the children's "care, protection,
 4 training and personal relationships" is in France, where they lived for three years prior to
 5 their temporary move to Ashland in July 2022.

6 This case fails to meet any of the requirements under ORS 109.741(1)(b).
 7 Therefore, this part of the statute cannot form the basis for this court to exercise subject
 8 matter jurisdiction.

9 **ii. More Appropriate Forum.** ORS 109.741(1)(c) confers jurisdiction
 10 to Oregon if:

11 "All courts having jurisdiction under subsection (1)(a) or (b) of this
 12 section have declined to exercise jurisdiction on the ground that a
 13 court of this state is the more appropriate forum to determine the
 14 custody of the child under ORS 109.761 [inconvenient forum] or
 15 109.764 [jurisdiction declined by reason of conduct]."

16 As discussed above, France has home state jurisdiction under ORS
 17 109.741(1)(a) and France has not declined to exercise jurisdiction over the case there.
 18 Therefore, this part of the statute also cannot provide a basis for this court to exercise
 19 subject matter jurisdiction.

20 **iii. No Other Jurisdiction.** ORS 109.741(1)(d) confers jurisdiction to
 21 Oregon if: "[n]o court of any other state would have jurisdiction under the criteria
 22 specified in subsection (1)(a), (b), or (c) of this section." Again, France clearly has
 23 home state jurisdiction under ORS 109.741(1)(a). Therefore, this part of the statute
 24 does not apply and cannot confer jurisdiction in Oregon.

25 **C. Conclusion.** By carefully reviewing the text and official comments of the
 26 UCCJEA, as well applicable case law, it is clear that the children were not without a
 home state when Mother filed this proceeding. France was still the children's home
 state, and France (not Oregon) appropriately has jurisdiction to make an initial custody

determination. There are two ways of establishing home state jurisdiction under the UCCJEA. The facts and the law can support a finding that France meets both of these requirements. Under the “extended home state provision” of the UCCJEA, France is the children’s home state because at the time Mother commenced this matter, the children had lived in France for six consecutive months within the six months prior to the filing of this case (between April 7, 2022, and October 7, 2022), and Father continues to live in France. Additionally, the children’s move from France to Oregon was a “temporary absence,” within the meaning of ORS 109.704(7) and, therefore, any time spent by the children in Oregon since July 29, 2022, counts toward the six-month requirement in the first part of ORS 109.741(1)(a). Either way, France is the children’s home state.

Mother’s read of the UCCJEA fails to give the statute full effect by ignoring the plain language of ORS 109.741(1)(a) and 109.704(7). Mother contends that, because the children had not been physically present in either France or Oregon for six consecutive months prior to her filing this matter, the children had no home state. That contention is *argumentum ad absurdum*. Under Mother’s interpretation of the UCCJEA, any parent could remove a child from their habitual residence (with or without the other parent’s consent), move the child to a new jurisdiction and, within the first six months, initiate a custody proceeding in the new jurisdiction by claiming that the child has no home state because the child had not lived in any one jurisdiction for six consecutive months prior to filing. That would defeat the purpose of the UCCJEA, which is, in part, to prevent parents from forum shopping their custody disputes, as Mother attempts to do here. UCCJEA § 101, comment (1999) (describing the purposes of the UCCJEA, including “[d]iscouraging the use of the interstate system for continuing controversies over child custody;” and to “[d]eter abductions of children.”).

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1 **3. Simultaneous Proceedings Under the UCCJEA.**

2 Mother has argued that this Court must comply with ORS 109.757(1), which is part
3 of the UCCJEA that addresses “simultaneous proceedings.” The statute provides, in
4 relevant part:

5 “(1) Except as otherwise provided in ORS 109.751 [temporary emergency
6 jurisdiction], a court of this state may not exercise its jurisdiction under
7 ORS 109.741 to 109.771 if, at the time of the commencement of the
8 proceeding, a proceeding concerning the custody of the child has been
9 commenced in a court of another state having jurisdiction substantially in
conformity with ORS 109.701 to 109.834, unless the proceeding has been
terminated or is stayed by the court of the other state because a court of
this state is a more convenient forum under ORS 109.761.

10 ORS 109.757(1) only applies if Oregon has a viable claim to jurisdiction under
11 the UCCJEA (“its jurisdiction”). Since France is the children’s home state, Oregon has
12 no viable claim to jurisdiction. It would be different, for example, if the family had moved
13 from jurisdiction to jurisdiction without remaining in any one place for six months or
14 more, with no intent on staying in any one place long term. Those were the facts in
15 *Schwartz and Battini*. In that case, there was no “home state,” so the Court had to
16 examine alternate bases to assert jurisdiction. *Schwartz*, 332 at 334. It is conceivable
17 that, under that set of facts, two states could have a viable claim to jurisdiction, in which
18 case the courts should confer to determine which state is the more convenient forum.
19 The convenience of the forum is a consideration under the alternate bases for
20 jurisdiction under ORS 109.741(1)(b)-(d), but not under the primary analysis of
21 jurisdiction under the UCCJEA: home state jurisdiction.

22 Even if Oregon had a viable claim to jurisdiction in this case such that ORS
23 109.757(1) applied, it would, under the terms of the statute, be prohibited from
24 exercising its jurisdiction because France has not dismissed or stayed the custody
25 proceeding there. To the contrary, it held a trial on March 31 and should be making a
26 custody determination on April 21. Provided that the French court accepts jurisdiction

1 and makes a custody decision later this month, then Oregon will have no further basis
 2 to act. See ORS 109.747 (prohibiting Oregon from modifying another jurisdiction's child
 3 custody determination, except in limited circumstances that would not apply to this
 4 case).

5 The UCCJEA commentary supports Father's position that ORS 109.757(1) does
 6 not apply because the children have a home state in France. The commentary on
 7 Section 206 of the UCCJEA (identical to ORS 109.757) explains that:

8 "This section represents the remnants of the simultaneous proceedings
 9 provision of the UCCJA § 6 [which preceded the current UCCJEA]. The
 10 problem of simultaneous proceedings is no longer a significant issue. Most
 11 of the problems have been resolved by the prioritization of home state
 12 jurisdiction under Section 201 [ORS 109.741(1)]; the exclusive, continuing
 13 jurisdiction provisions of Section 202 [ORS 107.744]; and the prohibitions
 14 on modification of Section 203 [ORS 109.747]. If there is a home State,
 15 there can be no exercise of significant connection jurisdiction in an initial
 child custody determination and, therefore, no simultaneous proceedings.
 Of course, the home State, as well as the State with exclusive, continuing
 jurisdiction, could defer to another State under Section 207 [inconvenient
 forum; ORS 109.761]. However, that decision is left entirely to the home
 State or the State with exclusive, continuing jurisdiction.

16 "Under this Act, the simultaneous proceedings problem will arise only
 17 when there is no home State, no State with exclusive, continuing
 18 jurisdiction and more than one significant connection State. For those
 19 cases, this section retains the "first in time" rule of the UCCJA. Subsection
 20 (b) retains the UCCJA's policy favoring judicial communication.
 Communication between courts is required when it is determined that a
 proceeding has been commenced in another State."

21 UCCJEA § 206, comment (1999). Because France is the children's home state,
 22 Oregon does not have jurisdiction or even a viable claim to jurisdiction. Furthermore,
 23 because Father's custody proceeding in France commenced prior to Mother's filing in
 24 this court, the requirements of ORS 109.757(1) do not apply.

25 The only way Oregon could have a viable claim to custody is if France declined
 26 to exercise jurisdiction. Oregon would still have to contend with ORS 109.764, which

requires it to decline to exercise jurisdiction if a parent has engaged in “unjustifiable conduct” to invoke the jurisdiction of the state. Mother deceived Father so she could remove the children from France and bring them to Oregon, where she seeks a custody determination. This is the precise kind of “unjustifiable conduct” that the UCCJEA is designed to prevent. If Oregon were ever given a legitimate opportunity to assert jurisdiction, the court must decline to exercise jurisdiction on that basis. If this court is inclined, after conferring with the court in France, to assert jurisdiction under ORS 109.741(1)(b)-(d), Respondent requests the court set a further hearing for the court to receive testimony and additional evidence of the parties to address the application of ORS 109.764.

4. Attorney Fees, Costs, and Disbursements.

If this motion is contested, Respondent should be awarded his reasonable attorney fees, costs, and disbursements herein pursuant to ORS 107.135, ORS 107.445, and ORCP 68. *See also Dornbusch and Dornbusch*, 195 Or App 61, 71 (2004) (holding that the award of attorney fees to a prevailing party is at the Court’s discretion).

Dated this 18 day of April, 2023.

SCHULTE, ANDERSON, DOWNES, ARONSON & BITTNER P.C.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **RESPONDENT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION (ORCP 21 A(1)(a))** on the following party:

Ryan Carty
Carty Law P.C.
P.O. Box 4628
Salem, OR 97302
ryan@cartylawpc.com

By the following method or methods:

_____ by **mailing** full, true, and correct copies thereof in sealed, first class postage prepaid envelopes, addressed to the attorney(s) as shown above, the last known office address of the attorney(s), and deposited with the United States Postal Service at Portland, Oregon on the date set forth below.

X by **emailing** full, true, and correct copies thereof to the attorney(s) at the email address shown above, which is the last known email address for the attorney(s) office, on the date set forth below.

_____ by **faxing** full, true, and correct copies thereof to the attorney(s) at the fax number(s) shown above, which is the last known fax number for the attorney(s) office, on the date set forth below. The receiving fax machines were operating at the time of service and the transmission was properly completed.

_____ by selecting the individual(s) listed above as a service contact when preparing this electronic filing submission, thus causing the individual(s) to be served by means of the **court's electronic filing system**.

DATED this 18th day of April 2023

SCHULTE, ANDERSON, DOWNES, ARONSON & BITTNER P.C.

By: s/Thomas A. Bittner
Thomas A. Bittner, OSB #90178
Attorneys for Respondent